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Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service.

ET Docket No. 95-18

**REPLY TO RESPONSE OF ICO SERVICES LIMITED TO PETITIONS FOR
RECONSIDERATION AND FOR PARTIAL RECONSIDERATION**

Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., Media General, Inc. (collectively, the “Joint Commenters”), by their attorneys and pursuant to the Commission’s Public Notice,¹ hereby submit this Reply to Response of ICO Services Limited to Petitions for Reconsideration and for Partial Reconsideration of the Commission’s *Second Report and Order and Second Memorandum Opinion and Order* in ET Docket No. 95-18 (the “Reply” and the “Order”).²

On September 6, 2000, in a Petition for Partial Reconsideration (“Petition”), the Joint Commenters requested that the Commission adopt a simple and effective means of resolving an inherent inconsistency in the rules adopted in the Order. Joint Commenters noted that grant of their Petition would serve the public interest by confirming that, in accordance with the Commission’s spectrum clearing policies, licensees in the broadcast auxiliary service (“BAS”) who serve small and mid-sized television markets will not absorb the expenses required to provide additional spectrum to new licensees in the mobile satellite service (“MSS”). In its Response, ICO Services Limited

¹ *Public Notice*, Federal Communications Commission, 2000 FCC Lexis 4794 (September 13, 2000).

² FCC 00-233 (July 3, 2000); 65 Fed. Reg. 48,174 (Aug. 7, 2000).

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(“ICO”) expresses general concern about the “relocation burden on initial MSS entrants,”³ but the Commission has made plain that new MSS entrants must reimburse incumbent BAS operators.

Joint Commenters noted in their Petition that a number of BAS licensees in markets other than the Top 30 (collectively, the “Exceptional BAS Licensees”) operate critical news-gathering and other broadcast auxiliary equipment on BAS Channel 1 that cannot be retuned to accommodate the flexible Phase I band plan. In some cases, the equipment simply is not capable of operating on different channels, regardless of which interim band plan is selected in the market. In other cases, equipment manufacturers are no longer in operation and therefore are unavailable to perform the necessary channel changes.

Thus, Joint Commenters requested that the Commission confirm that its spectrum clearing policies and rules, as expressed in Section 74.690(d), require that MSS licensees compensate those Exceptional BAS Licensees which have non-retunable equipment that are vacating spectrum for the new entrants. ICO recognizes that “those fixed BAS units that operate only on one channel and were manufactured to operate on BAS Channel 1” would experience “technical difficulty.”⁴ ICO only focused on the examples provided in the Petition of fixed-link Media General BAS stations and recognized that these could be a special case for reimbursement. The Joint Commenters, however wish to make clear that broadcasters should be reimbursed for *all* non-retunable channel BAS equipment – and not just fixed-link equipment.

Under the Commission’s rules for the transitional Phase I, Exceptional BAS Licensees face one of two choices (as determined by each market) upon losing the use of BAS Channel 1: (1) use the remaining six channels at the existing bandwidth or (2) create seven channels out of the remaining spectrum by reducing channel width. In either case, Exceptional BAS Licensees may be

³ ICO Response at 2.

⁴ ICO Response at 8.

required to retune or replace equipment. In the first case, BAS licensees with non-retunable equipment on Channel 1 should be reimbursed. In some markets, however, six BAS channels will be insufficient for broadcasters to serve viewers. Accordingly, all BAS licensees in those markets will be forced to retune to narrower channels and, therefore, should be timely reimbursed for replacement equipment necessary to accomplish this result.

ICO asserts that manufacturers already have built equipment that can be switched to operate on Phase I frequencies.⁵ Even though some manufacturers may have designed new equipment, however, manufacturers admit to the Joint Commenters that the new equipment will not have the high-performance capability to qualify as “comparable,” especially with split-channel and adjacent-channel operations. Not only must transmitters and receivers be capable of having their operating frequencies changed, but retunable receivers also must be capable of filtering a narrower spectrum for smaller channel widths. Many receivers may not be retunable and will have to be replaced. Furthermore, it will be necessary to retune or modify the audio subcarrier frequencies when the channels are narrowed.⁶ In addition, some television auxiliary microwave links use equipment “grandfathered” pursuant to the provisions of the Commission’s rules. Any change of frequency or other modification necessitating an application to the Commission would require, in most cases, that the equipment be replaced in its entirety, perhaps even moving it to another BAS band, regardless of whether it otherwise could be adapted for use on an adjacent channel.⁷

⁵ ICO Response at 5.

⁶ To the extent rechannelization and/or digital operation necessitates relicensing, the Commission should affirmatively facilitate such a process.

⁷ See, e.g., 47 C.F.R. § 74.644; *Memorandum Opinion and Order on Reconsideration of Third Report and Order*, GEN. Docket No. 82-334 (Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services' Use of Certain Bands Between 947 MHz and 40 GHz), 64 RR 2d 29 at para. 14-18, 2 FCC Red 6750, 1987 FCC LEXIS 2728 (November 4, 1987).

ICO suggests that “[o]f all the existing fixed BAS units, . . . probably most . . . can be reprogrammed or retuned and filtered by the manufacturer.”⁸ To the contrary, manufacturers have confirmed to Joint Commenters that: (1) only transmitter equipment manufactured in the last four to eight years can be retuned and (2) most receivers cannot have their filters tuned and must either have the filters or the entire receiver replaced to achieve equivalent performance in reduced spectrum.

ICO alleges that BAS licensees in markets outside the top 100 would not be harmed if Phase II of the relocation plan does not materialize. Thus, it dismisses the need of markets outside of the top 100 for seven BAS channels.⁹ Spectrum congestion, however, is not necessarily a function of market size. It depends, instead, on the number of TV stations that are producing local news, weather and sports. Many smaller markets even now have four network affiliates delivering news gathering services to local viewers. This level of activity makes it difficult to operate with the existing seven BAS channels, much less six. In many heavily congested markets outside the top 100, all seven channels are coordinated for use. Such is the case, for example, for Cosmos’ station, KGBT-TV in Harlingen, Texas (DMA 102). Not only would many stations outside the top 100 markets have to abandon Channel 1 operations, but they also would have to retune to the Phase I band plan. If the equipment cannot be retuned due to the inherent limitations of the equipment design or the unavailability of the original manufacturer, MSS licensees should be required to reimburse the BAS licensee for the equipment and related costs necessary to move to the Phase I band plan.

Exceptional BAS Licensees also would face harm from delayed compensation under the apparent rules. BAS operators face a legitimate and substantial risk that they may never be reimbursed under a delayed compensation scheme, given the economic disasters that some MSS

⁸ ICO Response at 8.

⁹ ICO Response at 4.

providers have encountered. Accordingly, the Commission's existing financial qualification rules should be strictly enforced.¹⁰ Contrary to ICO's assertions, Exceptional BAS Licensees face very real harms even if Phase II never commences.

ICO argues that if BAS licensees in markets outside of the top 100 have congestion problems, they could implement channel splitting "if their instantaneous demand ever exceeds the capacity of . . . six channels."¹¹ ICO fails to recognize that the inadequacy of six channels in markets outside the top 100 may be a persistent, long-term problem and that channel splitting accordingly is not a viable solution. Furthermore, channel splitting can seldom be accomplished with existing equipment because high-performance transmitters and receivers (including special filters in some cases) are required. If the Commission finds that channel splitting is an operable solution, as ICO suggests, BAS licensees should be reimbursed, regardless of market size, where existing BAS equipment cannot be retuned.

Significantly, the reimbursement requirement to BAS operators in smaller markets is important given the indefinite commencement of Phase II coupled with the fixed sunset period. Although ICO asserts that a ten-year sunset period is too generous,¹² it ignores that the uncertainty of the Phase II commencement permits MSS entrants to avoid reimbursing small market BAS operators. Indeed, many small market BAS licensees likely will be required to retune or purchase *two* sets of equipment to accommodate Phase I and II band plans.

Finally, ICO notes in its Response that it expects to send a questionnaire to television stations in the top 30 DMA/Nielson markets. ICO states that "[g]ood-faith performance by the television

¹⁰ The demonstrable ability to make these payments are an essential obligation for the MSS licensee to have access to the band and are necessarily part of the "financial, technical, and other qualifications" of the MSS licensee that the Commission has an obligation to police under Section 308(b) of the Communications Act.

¹¹ ICO Response at 4.

¹² ICO Response at 4.

stations requires the return of a timely and complete questionnaire in response to [ICO's] inquiry." To ensure accurate and meaningful responses, broadcasters in all DMAs should have the time to be educated properly about the FCC's Order, band plan options, and the reconsideration process, and receive information from manufacturers regarding their equipment choices. The Commission should make it clear that ICO cannot use the failure to return a questionnaire of unknown content and purpose to impose new obligations or deadlines on BAS licensees or to alter the obligations for compensation imposed upon ICO by the Commission's Rules.

As Joint Commenters have demonstrated, clarifying the obligations of these Exceptional BAS licensees will facilitate the orderly and timely reallocation of 2 GHz spectrum without imposing undue expenses and uncertainty on small and mid-size market broadcasters. Accordingly, a grant of the Petition would serve the public interest. For the foregoing reasons, the Joint Commenters urge the Commission to grant their Petition for Partial Reconsideration.

Respectfully submitted,

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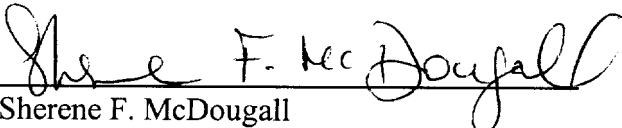
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